

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:15-CR-219 JCM (VCF)

Plaintiff(s),

ORDER

V.

JONATHAN PHILIP MOSZ,

Defendant(s).

Presently before the court is defendant Jonathan Philip Mosz's motion to vacate his sentence under 28 U.S.C. § 2555. (ECF No. 58). The government responded in opposition (ECF No. 60) to which Mosz replied (ECF No. 61).

I. BACKGROUND

Mosz pled guilty to being a felon in possession of a firearm. (ECF No. 58 at 5). The court sentenced him to 77 months in prison and 3 years of supervised release.¹ (*Id.*). After Mosz's conviction, the Supreme Court decided *Rehaif v. United States*. 139 S. Ct. 2191 (2019). In *Rehaif*, a defendant—a foreign student who overstayed his visa and was unaware of his illegal status—successfully challenged his conviction for possessing a firearm. *Id.* at 2194–95. After *Rehaif*, to obtain a conviction under 28 U.S.C. §922(g), the government “must prove both that the defendant knew he possessed a firearm and that he knew he

¹ According to the BOP inmate database, Mosz's custodial term ended on March 16, 2021. Section 2255 only applies to prisoners "in custody under sentence of a court established by Act of Congress." 28 U.S.C. § 2255(a). A person is in custody of the United States if his or her movements "are restrained by authority of the United States . . ." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (internal quotation marks omitted). Because Mosz is on supervised release, (see ECF No. 64), the court will not deny this motion as moot.

1 belonged to the relevant category of persons barred from possessing a firearm.” *Id.* at 2200.²
2 “For example, in a felon-in-possession prosecution under § 922(g)(1), the defendant must
3 know that his or her prior conviction was punishable by more than one year of
4 imprisonment.” *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020). Mosz now moves
5 to vacate his conviction under 28 U.S.C. § 2555 in light of *Rehaif*. (ECF No. 58).

6 **II. LEGAL STANDARD**

7 Federal inmates can petition “to vacate, set aside or correct [their] sentence” if their
8 sentence violates the Constitution or federal law. 28 U.S.C. § 2255(a). Relief is warranted
9 only when “a fundamental defect” caused “a complete miscarriage of justice.” *Davis v.*
10 *United States*, 417 U.S. 333, 345 (1974); *see also Hill v. United States*, 368 U.S. 424, 428
11 (1962). The petitioner is entitled to an evidentiary hearing “[u]nless the motion and the files
12 and records of the case conclusively show that the prisoner is entitled to no relief.” 28
13 U.S.C. § 2255(b).³ There are limitations on § 2255 relief because the petitioner “already has
14 had a fair opportunity to present his federal claims to a federal forum.” *United States v.*
15 *Frady*, 456 U.S. 152, 164 (1982). The statute’s purpose is not “to provide criminal
16 defendants multiple opportunities to challenge their sentence.” *United States v. Johnson*, 988
17 F.2d 941, 945 (9th Cir. 1993).

18 When the petitioner had “a full and fair opportunity to litigate [his claim] on direct
19 appeal” he cannot relitigate the claim in a § 2255 motion. *United States v. Hayes*, 231 F.3d
20 1132, 1139 (9th Cir. 2000). And if the petitioner could have litigated his claim on direct
21 appeal but failed to do so, the claim is procedurally defaulted. *Massaro v. United States*, 538
22 U.S. 500, 504 (2003); *Bousley v. United States*, 523 U.S. 614, 622 (1998). A petitioner can
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25 ² Mosz and the government read *Rehaif* differently. (*Compare* ECF No. 57 at 7–8,
26 ECF No. 61 at 4–5, *with* ECF No. 58 at 5–6). Contrary to Mosz’s reading, missing in *Rehaif*
27 is “any notion that, in felon-in-possession cases, the government is also required to prove that
28 the defendant *knew he was prohibited from possessing a firearm*, which goes to the heart of
the ‘ignorance of the law’ maxim.” *United States v. Reynolds*, No. 2:16-cv-00296-JAD-
PAL, 2020 WL 5235316, at *2 (D. Nev. Sept. 2, 2020) (emphasis added). The Ninth Circuit
reads *Rehaif* like the government does. *Singh*, 979 F.3d at 727.

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30 ³ The court will rule on this motion without an evidentiary hearing.

1 overcome procedural default if he can show cause and prejudice or actual innocence. *United
2 States v. Braswell*, 501 F.3d 1147, 1149 (9th Cir. 2007).

3 **III. DISCUSSION**

4 To begin with, Mosz's motion is timely as it was filed within one year of the Supreme
5 Court deciding *Rehaif*.⁴ See 28 U.S.C. § 2255(f)(3) (The one-year statute of limitations for
6 habeas relief runs from “the date on which the right asserted was initially recognized by the
7 Supreme Court.”). Mosz's main contention is that the indictment failed to properly charge
8 all the elements of the offense in 18 U.S.C. § 922(g)(1). (ECF No. 58 at 15–16). He says
9 this defect deprived the court of jurisdiction (ECF No. 58 at 14–16), cannot be waived in a
10 plea agreement (ECF No. 58 at 21), caused him actual prejudice (ECF No. 61 at 13–17) or,
11 in the alternative, is a structural error where actual prejudice is presumed (ECF No. 61 at 11–
12). The court will address these arguments in turn.

13 **A. Jurisdiction**

14 An indictment must sufficiently charge an “offense[] against the laws of the United
15 States.” 18 U.S.C. § 3231; see also *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir.
16 2003). Yet the Supreme Court in *United States v. Cotton* held that “defects in an indictment
17 do not deprive a court of its power to adjudicate a case.” 533 U.S. 625, 630 (2002). A claim
18 that “the indictment does not charge a crime against the United States goes only to the merits
19 of the case.” *Id.* at 630–31 (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)).
20 Mosz's reliance on two pre-*Cotton* Ninth Circuit cases is unavailing. (ECF No. 58 at 14).
21 And regardless, the Ninth Circuit has since held that an indictment's omission of a
22 knowledge of status element does not deprive the court of jurisdiction. See, e.g., *United
23 States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020); *United States v. Velasco-Medina*,
24 305 F.3d 839, 845–46 (9th Cir. 2002). Thus, the court rules that it did not lack jurisdiction
25 despite the indictment not charging the *Rehaif* knowledge element.

27 ⁴ However, this motion is timely only if *Rehaif* applies retroactively. Because the
28 courts are divided on this issue, the court will assume that *Rehaif* applies retroactively for the
purpose of this motion. *United States v. Bueno*, No. 2:17-cv-00406-RCJ-GWF, 2020 WL
4505525, at *1 (D. Nev. Aug. 5, 2020).

1 **B. Waiver of § 2255 Challenges in Plea Agreement**

2 Mosz “knowingly and expressly waive[d] all collateral challenges, including any
3 claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
4 court adjudicated guilt and imposed sentence.” (Plea Agreement, ECF No. 28 at 9). The
5 Supreme Court in *Tollet v. Henderson* held that such a waiver in a guilty plea bars
6 “independent claims relating to the deprivation of constitutional rights that occurred prior to
7 the entry of the guilty plea” except claims related to the knowing and voluntary nature of the
8 plea and claims of ineffective assistance of counsel. 411 U.S. 258, 267 (1973). In addition,
9 only a few select claims that “implicate[] ‘the very power of the State’ to prosecute the
10 defendant” are not barred by *Tollett*. *Class v. United States*, 138 S. Ct. 798, 803 (2018)
11 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)); *see also United States v. Chavez-*
12 *Diaz*, 949 F.3d 1202, 1208 (9th Cir. 2020).

13 While the Ninth Circuit has suggested that the *Tollett* bar may not apply when the
14 indictment fails to charge an offense, *United States v. Johnston*, 199 F.3d 1015, 1020 n.3 (9th
15 Cir. 1999), the Supreme Court has upheld the bar where the constitutional defect could have
16 been cured with a new indictment. *See Class v. United States*, 138 S. Ct. 798, 804–05
17 (2018). That is the case here. Any claims that the defective indictment violated Mosz’s right
18 to be free from prosecution absent a valid grand jury indictment and his right to adequate
19 counsel and notice could have been cured by a new indictment. (ECF No. 58 at 16–21);
20 *accord Bueno*, 2020 WL 4505525, at *3–4.

21 Although the Ninth Circuit has not squarely addressed this issue, other circuits have
22 held that *Tollett* bars habeas relief based on an indictment without the *Rehaif* knowledge
23 element. *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020) (“[A] guilty plea
24 waive[s the] right to assert that the indictment fail[s] to state an offense.”); *United States v.*
25 *Lavalais*, 960 F.3d 180, 186 (5th Cir. 2020) (“To the extent [the defendant] argues his
26 indictment is fatally defective because it did not contain an element of the offense under §
27 922(g), he failed to preserve that claim by pleading guilty.”). Thus, the court finds that
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1 Mosz's waiver in his plea forecloses this § 2255 claim. *Accord United States v. Beale*, No.
2 2:17-cv-00050-JAD-CWH, 2021 WL 325713, at *5 (D. Nev. Feb. 1, 2021).

3 **C. Procedural Default**

4 Even if Mosz did not waive this § 2255 claim, he cannot show actual prejudice to
5 overcome his procedural default. As discussed, a claim not raised on direct appeal is
6 procedurally defaulted and can only be raised in a § 2255 motion if the petitioner can show
7 cause and actual prejudice or actual innocence. *See Bousley*, 523 U.S. at 622. “[W]here the
8 claim rests upon a new legal or factual basis that was unavailable at the time of direct
9 appeal,” a petitioner has cause for failure to raise the claim on direct appeal. *Braswell*, 501
10 F.3d at 1150. Actual prejudice requires the petitioner to show “not merely that the errors
11 at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and
12 substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”
13 *Frady*, 456 U.S. at 170.

14 Mosz has shown cause because *Rehaif* “overturn[ed] a longstanding and widespread
15 practice to which [the] Court has not spoken, but which a near-unanimous body of lower
16 court authority has expressly approved.” *Reed v. Ross*, 468 U.S. 1, 17 (1984). But Mosz
17 cannot show actual prejudice. At the time of the offense, he had “previously served more
18 than a year in prison *for his prior Nevada convictions for felon in possession of a firearm.*”
19 (ECF No. 60 at 18 (emphasis in original)). Mosz’s criminal history score was 22 and his
20 presentence investigation report listed several violent felony convictions and arrests. (PSR
21 ¶¶ 42–61). It is simply implausible that Mosz did not know he was a convicted felon.
22 *Accord Beale*, 2021 WL 325713, at *3 (“Beale must still show ‘actual prejudice’ to excuse
23 his default. Beale can’t do so with a criminal record and sentencing history like his.”); *United*
24 *States v. Lowe*, No. 2:14-cr-00004-JAD-VCF, 2020 WL 2200852, at *1 n.15 (D. Nev. May
25 6, 2020) (collecting cases in which defendants’ prior felony convictions precluded a finding
26 of actual prejudice).

27 In addition, the court will not rule that *Rehaif* error is a structural error that excuses
28 Mosz from showing actual prejudice. That is because structural errors are a very limited

1 class of errors that affect the framework within which the trial proceeds, such that it is often
2 difficult to assess the effect of the error. *See United States v. Marcus*, 560 U.S. 258, 263
3 (2010). And ruling otherwise would be imprudent based on the Ninth Circuit’s treatment of
4 *Rehaif* in different contexts. For example, in *Tate v. United States*, the Ninth Circuit held
5 that *Rehaif* was a statutory interpretation case and “did not invoke any constitutional
6 provision or principle” that could sustain a successive § 2255 motion. *Tate v. United States*,
7 982 F.3d 1226, 1228 (9th Cir. 2020). And in *United States v. Benamor* and *United States v.*
8 *Johnson*, the Ninth Circuit did not treat *Rehaif* error as structural and instead conducted
9 plain-error review and held that the error did not affect the defendants’ substantial rights or
10 the fairness, integrity, or public reputation of the judicial proceedings. *United States v.*
11 *Johnson*, 833 F. App’x 665, 668 (9th Cir. 2020); *United States v. Benamor*, 937 F.3d 1182,
12 1189 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020). And after all, the *Rehaif* court
13 itself remanded the case for harmless error review rather than automatically reversing the
14 conviction. *Rehaif*, 139 S. Ct. at 2200. For these reasons, the court will not excuse Mosz’s
15 failure to show actual prejudice.

16 **D. Certificate of Appealability**

17 The right to appeal a court’s denial of a § 2255 motion requires a certificate of
18 appealability. To obtain such a certificate, the petitioner must make a “substantial showing
19 of the denial of a constitutional right.” 28 U.S.C. § 2253(c). That is, “[t]he petitioner must
20 demonstrate that reasonable jurists would find the district court’s assessment of the
21 constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077–79 (9th Cir. 2000). Based on this standard and the
22 almost uniform treatment of post-*Rehaif* § 2255 motions in this district, the court denies
23 Mosz a certificate of appealability.

24 **IV. CONCLUSION**

25 Accordingly,

26 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Mosz’s § 2255
27 motion (ECF No. 58) be, and the same hereby is, DENIED.

1 IT IS FURTHER ORDERED that a certificate of appealability is DENIED.
2 The clerk shall enter a separate civil judgment in 2:20-cv-01089-JCM.
3 DATED April 29, 2021.

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5 UNITED STATES DISTRICT JUDGE

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